No. 13405

In the United States Court of Appeals

for the Ninth Circuit.

THERON LEROY ELDER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

J. B. TIETZ,
257 S. Spring Street,
Los Angeles 12, California.
Attorney for Appellant.

TOPICAL INDEX

TABLE OF CASES AND AUTHORITIES CITED

Cases

Code

In the
United States
Court of Appeals
for the Ninth Circuit.

THERON LEROY ELDER, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 13405

Appellant's Opening Brief

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction of the appellant by the District Court of the Southern District of California.

This court has jurisdiction under the provisions of 28 United States Code, Sections 1291 and 1294 (1).

STATEMENT OF CASE

Appellant was indicted on April 2, 1952 under U. S. C., Title 50, App., Sec. 462—Selective Service Act, 1948, for refusing to submit to induction.

Appellant was convicted by a jury, Judge Ben Harrison presiding, on May 14, 1952; he was sentenced by said judge to a 3-year term of imprisonment on May 26, 1952 and is now in the Tucson, Arizona, Prison Camp.

In the court below as well as before the Selective Service agencies, appellant claimed to be a conscientious objector to all military activities and that he was entitled to a classification as such.

The Selective Service System initially classified him in Class I-A-O,[1] mailing him notification of this action on August 30, 1950. Within the 10 days provided by the regulations the registrant ambiguously asked for a personal appearance hearing. [This letter is part of Exhibit 1[2]]. The local board considered this request a Notice of Appeal as is shown by its records and by the testimony of its clerk and, therefore, it did not give him a personal appearance hearing [R. p. 19]. On the other hand, neither did it send the file to the Appeal Board, although the regulations mandatorily require that the file be sent " . . . immediately . . . but in no event later than five days after the appeal is taken."[3] The regulations mandatorily require the registrant be given a personal appearance hearing " . . . if he files a written request there-

---

[1]This classification is for registrants found to be sincere conscientious objectors who do not object to participation in non-combatant military service: 32 C. F. R. 1622.11 (a).

[2]The entire Selective Service File of appellant was entered in evidence as Government's Exhibit 1.

[3]32 C. F. R. 1626.13.

fore within 10 days after the local board has mailed a Notice of Classification . . . "[4]; instead, appellant's local board "reviewed the entire folder of the case and reclassified him I-A-O" [R. p. 19]. Thereafter, and within 10 days, the appellant made another (and very similar) written request for a personal interview; again he was not invited to meet the board and discuss his facts but this time the file was sent to the Appeal Board [R. p. 19]. The Appeal Board made its decision on June 27, 1951; thereafter, the Government Appeal Agent called the attention of the local board, by letter dated July 26, 1951 [this letter is part of Exhibit 1] that appellant had never had " . . . an opportunity to personally state his case before your Board . . . " so the local board invited him to appear before it on August 23, 1951. Appellant left his work with the American Friends Service Committee in Mexico and met with the local board on the appointed date; the board refused to do anything; in fact, before admitting him to their presence he was required to sign a typewritten "Waiver of Rights of Reopening of Case."

During the trial appellant attempted to raise a question of fact for the jury on the point of whether he had asked for a personal appearance before the local board [R. pp. 39-41, 45-46]; appellant's requested instruction No. 13 on this point was also rejected [R. p. 51]. Appellant was also rebuffed on the alternate

---

[4] 32 C. F. R. 1624.1 (a).

theory that this point, regarded as a legal question, should have been declared a denial of due process by the trial court [R. pp. 40-41].

During the trial appellant attempted to introduce evidence to show that the Advisory Opinion of the Department of Justice Hearing Officer [used by the Department and by the Appeal Board in the determination of the appeal classification] was so factually incorrect that it was sufficiently prejudicial to constitute, in itself, a denial of due process; the court below refused to admit such evidence [R. pp. 45, 48]. Appellant's requested instruction No. 14 on this point was also rejected [R. p. 51].

Appellant also attempted to show that no notice of appellant's reclassification had been sent his dependent mother [R. pp. 41, 42, 45] as required by the regulations.[5]

---

[5] 32 C. F. R. 1623.4 (b).

QUESTIONS PRESENTED

1. Whether a clumsy request for a personal appearance hearing is to be literally or liberally construed. Stated differently, where an appellant made a timely, written request for a "personal appearance hearing before the appeal board" and, as the local board well knew, there is no such thing as a personal appearance before an appeal board; and where the local board eventually sent this file on as an *appeal* to the appeal board is the hearing the local board belatedly gave him (after the appeal board made its decision) the kind of personal appearance hearing contemplated by the regulations.

2. Whether in a trial for failure to submit to induction a defendant may present evidence that the Advisory Opinion of the Hearing Officer to the Department of Justice [and used by it and by the appeal board in determining the registrant's classification] was so factually incorrect and so prejudicial that it constituted a denial of due process; and whether it is a further denial of due process for a Hearing Officer to fail to disclose before or during the hearing, when requested by the registrant, adverse material which was later used by him in his Advisory Opinion.

3. Whether a denial of due process exists where the local board does not notify the registrant's mother after the registrant is reclassified, evidence of her dependent status having been submitted by her and being present in the file.

SPECIFICATION OF ERRORS

1. The District Court erred in not concluding that appellant had made a timely written request for a Personal Appearance Hearing before the local board and that he had been denied due process when, instead of a personal appearance hearing, he was given an appeal [R. pp. 19, 41]; the District Court erred in not giving appellant's proposed jury instruction No. 13 on this subject [R. p. 51]; the District Court erred in refusing to admit evidence on this point and in not submitting the issue to the jury:

> "MR. TIETZ: We would save time, if the court means by that, as I think the court does mean, that the court will not permit any evidence to come in to show any of these claimed denials of due process.
>
> "THE COURT: Yes, I am holding that. I am holding, in effect, it is a question of law for the court to pass upon" [R. p. 45].

2. The District Court erred in refusing to admit testimony that the Hearing Officer forwarded, for the consideration of the Department of Justice and the Appeal Board an incomplete and incorrect report of the Hearing conducted by him; further, that he did not inform the appellant either before or during the Hearing that he had information from the F.B.I. adverse to the appellant's claim; in fact, he did state to appellant that there were no adverse statements in your case, but I have a couple of questions to ask you;

that the Hearing Officer subsequently used adverse hearsay information in his Advisory Opinion without having given registrant any opportunity to explain or rebut it [R. p. 45]; that the court erred in refusing to submit the issue to the jury and in refusing to give appellant's proposed jury instruction Nos. 10 and 14 on the subject [R. p. 51].

3. The District Court erred in not concluding that the appellant's mother had notified the local board in writing of her dependency. The Court further erred in not concluding appellant had been denied due process when the local board failed to send the mother a Classification Notice, thus depriving her of the opportunity to appeal independently of appellant; the Court erred in not submitting the issue to the jury.

ARGUMENT

I.

A CLUMSY, BUT TIMELY, WRITTEN REQUEST BY A SELECTIVE SERVICE REGISTRANT, FOR THE PERSONAL APPEARANCE PROVIDED BY THE REGULATIONS AFTER CLASSIFICATION IS TO BE LIBERALLY CONSTRUED AND A DENIAL OF SUCH A REQUEST IS A DENIAL OF DUE PROCESS.

Notice of Classification (SSS Form No. 110) is a standard size government post card; the following Notice of Right to Appeal, in very small type appears on the left one-fourth of this card [to show the precise size of the type it is reproduced in it, as well as in the size required by Rule 21]:

Appeal from classification by local board must be made within 10 days after the mailing of this notice by filing a written notice of appeal with the local board.

Within the same 10-day period you may file a written request for personal

appearance before the local
board. If this is done, the
time in which you may
appeal is extended to 10
days from the date of
mailing of a new Notice
of Classification after such
personal appearance.

If an appeal has been
taken and you are classi-
fied by the appeal board in
either Class I-A or Class
I-A-O and one or more
members of the appeal
board dissented from such
classification you may file
a written notice of appeal
to the President with your
local board within 10 days
after the mailing of this
notice.

It is obviously desirable for a disappointed registrant who sincerely believes himself misunderstood to

avail himself of the opportunity to appear personally before the local board. In fact, this is his only opportunity to do so for, at all other times, he speaks only to the clerks.

As was said by the third circuit in *United States vs. Stiles,* 169 F. 2d 455, 458:

> "Upon reading these provisions we see at once from paragraph (b) that the purpose of the personal appearance is not solely to present the local board with new information. It is also to enable the registrant to discuss his classification with members of the board on the basis of the information already in his file and to make an oral argument that the information already furnished, when given proper weight, calls for a different classification. The right to have such an opportunity to talk over and explain his case to members of the board is obviously of the greatest value to a registrant even though he has no new information to present and this right the regulation guarantees."

It is quite obvious from the Notice of Right to Appeal, there is no mention of any right to a personal appearance before the *Appeal Board.* In fact, there is no such right, or even possibility. Counsel for appellant, in an endeavor to understand Appeal Board processing has persistently tried to secure permission to audit one such session, to verify, among other things the information given him that the Appeal Board now processes only 50 cases an hour whereas it processed

80 an hour in W.W.II. Permission was denied by every official, including the California State Director.

We submit it is only fair to conclude a registrant asking for a personal appearance, within the 10 days of the Notice is responding to the notice and is asking for what it offers. If he, through inadvertence, or any other reason, uses a strange or ambiguous formula of words we believe a reasonable effort should be made by the local board to ascertain his meaning and intention.

As was said by this court in *Cox vs. Wedemyer,* 192 F. 2d 920, 922-923:

> " . . . the procedure established under the Selective Service Act of 1940 was designed to fit the needs of registrants unskilled in legal procedure, many of whom, too, were wholly or partially illiterate, and none of them represented by counsel."

Appellant submits his situation is parallel. The ambiguity of his request [for a "personal appearance hearing before the appeal board"] is certainly due in part to the wording of the Notice of Right to Appeal. The emphasis in this notice on "appeal" and its repetition of the word "appeal" could well be expected to confuse the average youngster. Since a registrant has a further 10-day period for an appeal *after* a personal appearance hearing any doubt should have been resolved in favor of giving appellant the personal appearance just as this court in *Cox's* case decided the

Appeal Board should have reclassified Cox *de novo,* and not partially.

In a recent case it appeared that the local board had given the registrant a personal appearance hearing before it classified him and, when he asked for another after he was classified the local board refused on the basis he had had a personal appearance hearing. The trial court observed, on page 598:

> "The Government stresses the uncontested fact that defendant had a hearing at the local board prior to the first classification. There was introduced in evidence a memorandum of this appearance, and it was initialled by three members of the board."

and on page 600 the court concluded

> "There is nothing in the Selective Service Regulations which bars the local board from holding a pre-classification hearing such as that in the instant case. No doubt hearings of this kind may be of some assistance to the board in drawing its conclusion as to what classification the registrant should be given. But this is not to say that a hearing at that time fulfills the requirements of Part 1624. The Regulation is met only when the registrant is afforded the opportunity to appear before the board after he has been classified."

United States v. Romano, 103 F. Supp. 597.

The fact that the local board in the instant case gave appellant a personal appearance hearing on

August 23, 1951 (a year after his request and after his appeal was decided) does not alter the denial of due process for the following reasons: first, he was required, before entering the board's presence, to waive his appellate rights; next, an appeal based on a personal appearance hearing is more valuable than one not so based for the regulations require the local board to place a written summary of what took place at the hearing in the registrant's file.

The present problem is very similar to the one considered by the third circuit in *United States v. Zieber,* 161 F. 2d 90. The following excerpt shows the court's disposition of an ambiguous request:

> "It is apparent from the testimony of the Clerk and that of the chairman that whether the Board listened to Zieber for 45 minutes or for only 4 or 5 minutes, it did not consider his testimony in determining his classification because the members were of the opinion that he had appealed his case when he filed with the Board the 'Written Argument,' hereinbefore referred to. If the filing of this document was in fact deemed by the Board to constitute an appeal (as seems to have been the case) it is difficult to see why Zieber's request for a personal appearance should have been granted by the Board on August 24 or why he should have been heard at all on August 27. But nothing contained in the 'Written Argument' requests an appeal or makes any reference to an appeal. The Board was not entitled to treat it as an appeal . . . " [92].

Any doubt concerning a registrant's meaning should be resolved in his favor. In *United States v. Hufford,* 103 F. Supp. 859, the court said

> "Whether or not the Board members intended to treat the registrant's letter as a notice of appeal is open to question, but the fact remains that the local board's own record shows a notice of appeal having been filed within the 10-day period. In view of the fact that Regulation 1626.11 provides that any notice shall be liberally construed in favor of the person filing the notice so as to permit the appeal, any doubt should be resolved in favor of the registrant. That there is such a doubt in this case cannot be disputed." [862].

Another reason for a measure of liberality towards registrants was given by Attorney-General McGranary in his last reported decision as a District Judge, *Ex Parte Fabiani,* 105 F. Supp. 139:

> "The different objective to be achieved by the new Act behooves us to employ a more liberal standard of judicial review, so as better to protect the rights of the individual. Should—which God forbid—world tensions increase greatly or should general war come, then the judicial arm can once again cut to the barest minimum its supervision of the operations of the draft." [146-7].

Appellant never asked for an *appeal.* He asked for a personal appearance. Since the local board knew appellant could not talk to the Appeal Board it had no

excuse for denying him the requested personal appearance and giving him the unsought appeal. Since the local board knew appellant never had a personal appearance before it; and since it knew the personal appearance with the local board was the next step in the Selective Service procedure the board should have given him the requested appearance *when* he asked for it. At the worst construction of the evidence whether appellant asked for a personal appearance before the local board was a question of fact for the jury. Since point number II embraces such an argument the Court is referred to it.

II.

THE FAILURE OF THE DEPARTMENT OF JUSTICE HEARING OFFICER TO DISCLOSE TO A REGISTRANT, UPON REQUEST, ADVERSE MATERIAL IN HIS POSSESSION IS A DENIAL OF DUE PROCESS IF HE USES THIS MATERIAL IN HIS ADVISORY OPINION. IT IS A FURTHER DENIAL OF DUE PROCESS IF THE ADVISORY OPINION DOES NOT CORRECTLY REFLECT WHAT TRANSPIRED AT THE HEARING.

The extreme importance of the Advisory Opinion in the appellate process demands that appellant's due process rights connected with it be safeguarded. In the Advisory Opinion the Hearing Officer recites the gist of both the exhaustive F.B.I. investigation and of

his interview with the appealing registrant. The Attorney General's instructions require that the Hearing Officer " . . . advise the registrant as to the general nature and character of any evidence in his position which is unfavorable to, and tends to defeat, the claim of the registrant, such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence."

Appellant believes that due process requires that he be permitted to introduce evidence on such matters and that these matters *were questions for the jury.* Appellant's proposed instructions Nos. 10 and 14 were before the court at all times and the court's rejection of evidence on this subject [R. p. 44] was made with knowledge of appellant's expected testimony and the said proposed instructions are to be considered as a proffer, together with appellant's efforts to testify on this particular point [R. p. 45].

The *Zieber* decision (supra) also makes clear that such questions of fact are for the jury:

> "Whether a selectee has or has not been afforded due process of law by the Selective Service agencies, there being disputed fundamental questions of fact as in the case at bar, should have been determined by the jury under proper instructions from the court."

Also see *Niznik v. United States,* 173 F. 2d 328.

Although this is a matter of first impression, a related denial of due process was denounced by Judge

Learned Hand in *United States v. Balogh,* 157 F. 2d 939:

> "As the case comes to us, the board made use of evidence of which Balogh may have been unaware, and which he had no chance to answer: a prime requirement of any fair hearing." [943]

III.

THE FAILURE OF THE LOCAL BOARD TO NOTIFY THE MOTHER OF THE RECLASSIFICATION WAS A DENIAL OF DUE PROCESS.

The selective service regulations [§1626.2 (a)] provide that a registrant's dependent may independently appeal a decision adverse to the registrant's claims. To implement this right it is required that the local board send notice of classification to the dependent [§1623.4 (b)]. The applicable portion of this subsection (b) reads:

> "(b) As soon as practicable after the local board has classified or reclassified a registrant into any class other than V-A, it shall mail a notice thereof on a Classification Advice (SSS Form No. 111) to every person who has on file any written request for the current deferment of the registrant."

The question present, of course, is whether appellant's mother had "on file a written request for the current deferment of the registrant." Appellant contends he should have been permitted to introduce evi-

dence on this point and should not have been foreclosed [R. pp. 42-45] and that the question should have gone to the jury. The trial court chose to decide this factual question by announcing the dependency letter was no more than a request appellant be permitted to be the mother's chauffeur [R. p. 43] although the letter clearly points out her *dependency.* [R. pp. 42-43].

Here again we have a question paralleling that raised in the *Cox* case (supra). Is this mother required to use the word "dependent?" Put another way and somewhat paraphrasing this court's thought in its *Cox* decision]: must a registrant and his mother be Philadelphia lawyers? The court resolved Cox's ambiguity in favor of the appellant and this appellant believes he too is entitled to this relief.

Finally, shouldn't this appellant have at least a Chinaman's chance when he needs the benefit of the doubt? The First Circuit reversed a conviction in the case of *Chih Chung Tung v. United States,* 142 F. 2d 919, because appellant had not been given the benefit of the doubt. Chih wrote to his local board "I appeal again not to be drafted . . . " and the appellate court decision noted that "The local board did not treat this letter as an appeal . . . " [both quotations from p. 920] and went on to say:

> "The letter is informal but it gave the registrant's name so as to show his right to appeal, and it expressed unmistakably the registrant's dissatisfaction with the action of the local board

classifying him in I-A. Furthermore, it gave reasons for that dissatisfaction. To be sure it does not refer to the board of appeal or expressly invoke the aid of that body, but it does use the words 'I appeal.' Considering the letter as a whole against the background provided by the papers on file with the local board, we think it would be taking a narrow and technical view wholly at variance with the spirit of the Act and the Regulations to regard the letter as anything but an appeal." [quoted from p. 921].

Respectfully submitted,

J. B. TIETZ,
Attorney for Appellant.